YAP HONG THIN & ANOR. v. SEENEVASAM

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) October 31, 1969]

[Penang — Federal Court Civil Appeal No. X. 32 of 1969]

Practice and Procedure — Application for recovery of possession — Whether application can be made by motion — Proceedings of a civil nature to be by action — R.S.C. 1957, 0.1 r.1.

Landlord and Tenant — Recovery of possession — Whether application may be made by originating motion — Control of Rent Act, 1966, s. 16 (1).

The question raised in this appeal was whether an application for recovery of possession under section 16 (1) of the Control of Rent Act can be made by way of originating motion. The application in this case was made by way of motion and the learned judge dismissed the application ([1969] 2 M.L.J. 29). On appeal,

Held, dismissing the appeal: where a person seeks an order of court for possession of premises in the High Court he has to do so by writ of summons in an action.

Cases referred to:-

(1) *Re Meister Lucius & Bruning Ltd.* [1914] W.N. 390.

(2) *E'Singam* v. *Dr. Sundram & Ors.* [1960] M.L.J. 91.

(3) *Ong Yok Chu & Anor.* v. *Yong Teck Fong & Anor.* [1960] M.L.J. 292.

FEDERAL COURT.

Lim Kean Siew for the appellants.

Dato' S. P. Seenivasagam for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of the High Court at Ipoh.

The appellants as landlords of premises described as No. 47 Jalan Anson, in Telok Anson, Perak, applied to the High Court for the recovery of the said premises from the respondent, their tenant, on the ground that the respondent had been in arrears of rent lawfully due for a period of more than 14 days. He did so by way of motion.

In his affidavit in support of the motion, the first appellant affirmed that he and his wife, the second appellant, let out the said premises to the respondent on a monthly rent of $112 payable in advance on the terms and conditions of tenancy printed on the reverse side of the receipts issued by them to the respondent.

By a notice to quit dated 25th September 1967 the appellant informed the respondent that they had terminated the tenancy in respect of the premises and the contractual tenancy of the respondent came to an end on 31st October 1967. The said notice was served on the respondent on 26th September 1967. They therefore prayed for an order in terms of the motion.

Nadesan s/o Velco Kowander, attorney of the respondent in his affidavit in reply first complained that the proceedings by way of motion for the recovery of premises were misconceived and on that ground alone asked that the motion be dismissed. He further alleged that it was the duty and practice for appellant No. 1 or his agent to call personally at the premises for rent. He also said that the only conditions of tenancy were those as to payment of rent but that the terms indorsed on the reverse of the receipt were the unilateral act of the appellants and not therefore binding on him. He denied that the respondent was in arrears of rent since neither the appellants nor their agent went to collect them at respondent's premises as was the usual practice. In any event the respondent had been on the premises for about 20 years as a tenant and he therefore prayed for the exercise of the discretion of the court under section 16(3) of the Control of Rent Act, 1966 in respondent's favour.

The learned judge considered a preliminary objection of the respondent that the appellant's application by way of motion was irregular and not authorised by any rule of the court or by any specific written law and therefore should be dismissed. It was urged before the learned judge that under rule 1 Order 1 of the Rules of the Supreme Court, all proceedings of a civil nature, and appellants' application would be such a proceeding, must be by way of action and not by way of motion. Rule 1 of Order 1 provides that save as otherwise provided by the rules or by any written law all proceedings of a civil nature in the High Court shall be by way of action. There is no doubt that under the rules proceedings for the recovery of possession of land must be by way of a writ of summons in an action. See Order 12, rules 25, 26, 27 and 28 and also Order 13 rule 8 where there are references to "action for recovery of land", "in a writ of summons for recovery of land" and so on. On the other hand, it was argued on behalf of the appellants that section 16(1) of the Control of Rent Act, 1966, specially provides that recovery of premises under the Act may be made by way of "application." That sub-section reads as follows:—

"16. (1) Except for an application made under section 18 for the recovery of possession of any controlled premises or any part thereof for the purpose of effecting or causing to be effected thereon any development, all applications for the recovery of possession of such premises or any part thereof shall be made to a court; and no order or judgment for the recovery or possession of any controlled premises or any part thereof comprised in a tenancy shall be made or given by the court except in any of the following cases —"

By reason of the words "All applications for recovery of possession" the section has now provided a new procedure namely by way of applications and therefore under Order 52 rule 1, by way of motions.

The question therefore that we have to decide is whether the word "applications" in the phrase "applications for recovery of possession" has the technical meaning of "application" in the rules of the court. In my view, the word "application" has the ordinary dictionary meaning of "putting into practical operation" and therefore if a person elects to seek an order of court for possession of premises in the High Court he has to do so by writ of summons in an action. If he elects to take proceedings in the sessions court he has to do so by way of summons provided by the rules of the subordinate court. It will be seen that under sections 70 and 71 of the Courts Ordinance 1948 a sessions court also has jurisdiction to hear and determine an action or suit for the recovery of immovable property.

We have since 1957, adopted the English Rules of Procedure and in England proceedings for recovery

of land have been for years by way of writ of summons and in my view there must be stronger and more definite provisions than are now found in section 16 of the Control of Rent Act before it can be said that a change of procedure has been intended. In the circumstances I would dismiss the appeal with costs.

Suffian F.J.: I agree that this appeal be dismissed with costs.

Ali F.J.: The only question in this appeal is whether in terms of section 16(1) of the Control of Rent Act, 1966 an application for recovery of possession in cases referred to in paragraphs (a) to (m) of the sub-section can be by way of originating motion. The sub-section provides:

"16.(1) Except for an application made under section 18 for the recovery of possession of any controlled premises or any part thereof for the purpose of effecting or causing to be effected thereon any development, all applications for the recovery of possession of such premises or any part thereof shall be made to a court; and no order or judgment for the recovery or possession of any controlled premises or any part thereof comprised in a tenancy shall be made or given by the court except in any of the following cases —"

The question was raised upon a preliminary objection by the respondent who successfully maintained that an originating motion was not a proper mode of application. The learned trial judge in dealing with this question took the view, following *Re Meister Lucius & Bruning, Ltd.*[1] that an originating motion is not irregular. But upon a further consideration of the issue involved which was one of fact, he decided, following *E'Singam* v. *Dr. Sundram & Ors.*[2] and *Ong Yok Chu & Anor.* v. *Yong Teck Fong & Anor.*[3] that the originating motion in this case was not suitable or proper. Thereupon the appellants' application was dismissed with costs.

I shall pause here to consider the cited cases. In *Re Meister Lucius* case, *supra*, Warrington J. on an application under the Trading with the Enemy Act, 1914 for an appointment of a controller observed that a motion as a mode of summary proceedings was a more convenient and appropriate form than the petition which was before him. As the Act under which application was made did not provide any particular form of procedure, his Lordship had no doubt that the application could be made by motion as was before the passing of the Courts of Judicature Act when the only mode otherwise than by writ was by motion. I do not think this case is an authority for the general proposition which can be accepted by this court that when an Act without more gives the person right to apply to the court such application can, as a matter of course, be made by motion. Proceedings of a civil nature in the High Court of this country are governed by the Rules of the Supreme Court, 1957 and Order 1 rule 1 of those Rules requires such proceedings to be by way of action unless otherwise provided. The landlord's claim in court for recovery of possession is a proceeding of a civil nature being a claim in contract. The nature of the application in *Re Meister Lucius* case, *supra*, is clearly different from the nature of an application made under section 16(1) of the Control of Rent Act, 1966. The former was an application for a summary exercise of power of appointment under an Act of Parliament. The latter, strictly speaking, is in the nature of a claim to enforce a contractual right. Such a claim even before the passing of the Courts of Judicature Act had to be by writ. The Control of Rent Act, 1966 like its predecessors is not designed to affect the relationship of the landlord and tenant which arises in contract but merely restricts the enforcement of right under such contract to certain causes of action such as default in the payment of rents or other specified breaches. As regards the other two cases cited they do not provide the real answer to the problem in this case which arose from a contention by the appellants that the use of the word "application" in section 16(1) of the 1966 Act contemplates a change in procedure. By implication the appellants fairly admit that under section 12(1) of the repealed Control of Rent Ordinance, 1956 the correct procedure was by way of action because that provision of the repealed Ordinance did not use the word "application". In my judgment the use of the word "application' in section 16(1) is merely a drafting convenience. This word appears in the first limb of the sub-section which deals with recovery of possession for the purposes of development; and appears again in the second limb which, as I have stated earlier, deals with a claim to enforce a right in contract. Its use in the first limb is clearly to provide consistency with section 18 of the Act where the word "apply" is used and in the second limb, in the plural, is to provide consistency with the first limb. That is all there is to it. What seems to have been overlooked is that in sub-section (6) of the same section there appears the word "proceedings" which plainly negatives any intention to change the procedure usually followed under the repealed Ordinance. For a different reason, therefore, I agree with the learned trial judge's conclusion that an originating motion is not in this case the proper mode of proceedings.

The only remaining question is whether the application should stand dismissed as ordered by the learned trial judge or stayed as suggested in paragraph 4 of the memorandum of appeal until the appellants adopt a proper course of action. In *Ong Yok Chu & Anor's* case, *supra*, an order of stay was made with a direction that the question of costs be dealt with in the action to be brought; while in *E'Singam's* case, *supra*, the application was dismissed with costs. In neither of these cases was any reason given for making the respective orders. For myself I feel inclined to think that the learned trial judge was right in dismissing the application. The appellants have chosen a course of action which was wrong right from the very start. They have done so upon an erroneous view of the law. To order a stay is to speculate on the possibility that they may decide to proceed by way of action. There is no reason why we should so speculate. The respondent having successfully objected to the form of proceeding ought not to be further inconvenienced by having to ponder when litigation would come to an end. It may well be that if further proceedings were properly brought a question might arise whether the

order of dismissal would operate as a bar. That question has not been argued before us and I do not think it is necessary that we should express any opinion on it. If there is going to be any difficulty it is one for which the appellants are wholly to blame. I would dismiss this appeal. On the question of costs this is clearly a matter for the discretion of the court and there is nothing in the circumstances of this case to suggest that this discretion has been wrongly exercised. The respondent shall have the costs here and below.

Appeal dismissed.

Solicitors: *Lim Kean Siew & Co.; Seenivasagam & Sons.*

NANYANG DEVELOPMENT (1966) SDN. BHD. v. HOW SWEE POH

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) October 31, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 37 of 1969]

Land Laws — Caveat — Application for removal of private caveat — Onus of proof — Whether on registered proprietor or on caveator — Evidence Ordinance, 1950, ss. 101, 106 — National Land Code 1965, s. 327.

The question in this appeal was, "On whom does the onus lie to satisfy the court that it may remove a private caveat when the registered proprietor applies to the court under section 327 of the National Land Code for an order for its removal?" The learned trial judge ([1969] 1 M.L.J. 232) held that the caveat registered by the Registrar of Titles was proper and valid and that the appellant (the registered proprietor) had failed to prove that the respondent was not one of the persons specified in section 323 of the National Land Code. He therefore dismissed the application.

Held (Ali F.J. dissenting), allowing the appeal: the onus of proof in an application under section 327 of the National Land Code is on the caveator and it is for the caveator to satisfy the court that it is just for the caveat to remain; the burden is on the caveator to satisfy the court that he has good grounds for his alleged claim that he has a registrable interest in the land.

Cases referred to:-

(1) *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd. The Kingswood* [1941] 2 All E.R. 165, 179.

(2) *Abrath* v. *The North Eastern Railway Co.* (1883) 11 Q.B.D. 440, 452, 457.

(3) *A. L. S. Sadayappa Chettiar* v. *P. C. R. ML. Letchumanan Chettiar* [1951] M.L.J. 105, 106.

(4) *Khoo Teck Yam* v. *Public Prosecutor* [1955] M.L.J. 112.

The following authorities were also cited: *Board of Education* v. *Rice* [1911] A.C. 179, 182; *Heywood* v. *B. D. C. Properties* [1963] 2 All E.R. 1063; [1963] 1 W.L.R. 975; *Innes'* Registration of Title in the F.M.S., pp. 114-116; *C. P. R.* v. *District Registrar of Dauphin* [1956] 4 D.L.R. (2d) 518; *Baalman's* Singapore Torrens System at p. 195; *In re Hitchcock* (1900) 4 W.N. (N.S.W.) 62, 63 (quoted by *Baalman* at p. 193); *Curtis & Ruoff:* "Registered Conveyancing", p. 777; *Hogg's* Registration of Title (1920): pp. 442 (section 184), 499 (s. 152), 536-537, 564-565 (s. 69), 597 (s. 152), 630 (s. 135); *Tee Chin Yong* v. *Jeff* [1963] M.L.J. 118; 20 *Halsbury's* Statutes (2nd Edn.) 1086; 1957 White Book, p. 938; *Re Meister* [1914] W.N. 390; *Sarkar* on Evidence (11th Edn.) Vol. 2, pp. 989-990.

FEDERAL COURT.

Lim Kean Chye for the appellant.

D. S. Nath for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the dismissal by the High Court of appellant's application for the removal of a caveat entered at the instance of the respondent, on the documents of title of certain lands of which the appellant was the proprietor.

The application was obviously taken under section 327 and not under section 326 of the National Land Code. If the application had been made under section 326, the Registrar of Titles would then serve a notice of intended removal in Form 19C and remove the caveat at the expiry of the period of one month from the date of the notice unless, before the expiration of the period of one month the caveator has obtained an order of the court to extend further the said period. Section 327 provides that any person or body aggrieved by the existence of a private caveat may, at any time apply to the court for an order for its removal and the court may make such order on the application as it may think just. It would be seen that section 326 only refers to the power of the court to extend the period for the removal of the caveat whereas section 327 provides for power of the court to make any order in reference to a caveat, which power, would include the power to order removal or otherwise of the caveat. As I understood counsel for the respondent, his contention was if the appellant had taken action under section 326 then the burden would be on the respondent to prove that he has a registrable interest in the land but in this case as it was the appellant who took action under section 327 then the burden would be on it to prove that the respondent had no registrable interest.

I am afraid I cannot understand this argument. Viscount Maugham in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd. The Kingswood*(1) dealing with the question of burden of proof in that case says this:

"Agreeing with the trial judge, I think the burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat non ei qui negat incumbit probatio.* It is an ancient rule founded on considerations of good sense, and it should not be departed from without strong reasons."

That rule means "the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it: for a negative is usually incapable of proof."

The learned authors of *Sarkar* on Evidence express the view that section 101 of the Evidence Ordinance is based on that rule.

The learned judge appeared to decide the matter on two questions.

(1) That the caveat registered by the Registrar is proper and valid and

(2) That the appellant had failed to prove that the respondent was not one of the persons specified in section 323 of the National Land Code.